Filed 11/5/10 P. v. Copeland CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. AARON CHRISTIAN COPELAND, Defendant and Appellant.	C061153 (Super. Ct. No. 07F09338)

Defendant Aaron Christian Copeland was found guilty of resisting a police officer in the lawful performance of his duties (Pen. Code, § 148, subd. (a)), a lesser included offense of battery of a peace officer (Pen. Code, § 243, subd. (c)(2)). The trial court granted the People's motion to dismiss, in the interest of justice, an allegation that defendant had a prior serious felony conviction. Imposition of sentence was suspended, and defendant was placed on probation with various conditions, including that he serve 180 days in county jail.

On appeal, he asks us to conduct an independent review of sealed personnel records to determine whether they contain any evidence that the peace officer has used excessive force or engaged in dishonest conduct. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (hereafter *Pitchess*); see Evid. Code, § 1043.) He also contends the judgment must be reversed because, in his view, the trial court committed instructional error and the prosecutor engaged in misconduct. Finding no prejudicial error, we shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

While on patrol shortly after 11:00 p.m. on September 29, 2007, Sacramento Police Officer Mike Mullen noticed defendant's car run a stop sign, speed through a 25-mile-per-hour residential zone, and twice roll through intersections and stop past the limit line. With red lights activated, Mullen stopped the car. Activation of the lights also activated Mullen's in-car camera, which recorded the entire incident, portions of which took place out of the camera's view.

Defendant was driving and his wife was in the front passenger seat. Officer Mullen told defendant why he had been stopped, and requested his driver's license, car registration, and proof of insurance. When defendant said he did not have his wallet and began fumbling around the center console and reaching towards the glove box, Mullen asked him to step out of the vehicle. Mullen then walked defendant to the patrol car, where he handcuffed him

and said he was going to put him in the back of the patrol car until Mullen "figured out who he [defendant] was."[1]

At that point, defendant became uncooperative and yelled to his wife, "You need to get out here and see this." She got out of the car and yelled, "What are you doing?" as she quickly approached the patrol car. Officer Mullen told her to get back in the car, and radioed for "code three" asking other available units to come with lights and sirens because "something bad could be happening."

Although handcuffed and under Officer Mullen's control, defendant was agitated and warned Mullen, "You better not put your hands on me." Mullen repeatedly instructed defendant to get in the car, while at the same time yelling at defendant's wife, "Get back in the car, I'll put handcuffs on you." When defendant refused to comply, Mullen eventually used force to get him into the patrol car, pushing him in the stomach area causing defendant to "collapse" into the rear seat and Mullen to fall in on top of him. In the process, defendant kicked Mullen in the hand, injuring his thumb. A doctor took X-rays and immobilized Mullen's thumb in a cast for three days.

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[1] Mullen thought he may have told defendant, "'I'm handcuffing you for my safety and your safety,' because that's usually what I say, and then I usually have a little tag line and then I say, 'The handcuffs come off as quickly as they go on.'"

DISCUSSION

I

Defendant asks us to conduct an independent review of the sealed records of the trial court's hearing on his *Pitchess* motion to obtain discovery of Officer Mullen's personnel records. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225.) We have done so.

The trial court informed defendant after the hearing that it had not found anything discoverable. Having reviewed the sealed records, we find the court did not abuse its discretion. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039.) It followed the proper procedures for discovery in a *Pitchess* hearing; sufficient information was provided for review and there is no evidence of citizen complaints that Officer Mullen used excessive force or engaged in acts of dishonesty.

II

Defendant contends the trial court "committed reversible error by instructing the jury with a modified version of CALCRIM No. 2670 that was erroneous, confusing, and lessened the prosecution's burden of proof." We disagree.

At trial, the parties agreed the prosecution "will not have to prove an arrest"; thus, they told the court "that type of language in the instructions, wherever you find them [references to an arrest, e.g., resisting arrest], can be deleted."

Accordingly, the court instructed the jury with a modified version of CALCRIM No. 2670, using "detention" and "detaining" instead of "arrest" and "arresting," as follows:

"As to both the greater charge of Battery on a Peace Officer, as charged in Count 1, as well as the lesser included charge of Resisting a Peace Officer, the People have the burden of proving beyond a reasonable doubt that Michael Mullen was lawfully performing his duties as a peace officer. If the People have not met this burden, you must find the defendant not guilty of the greater charge of Battery on a Peace Officer, as charged in Count 1, as well as the lesser included charge of Resisting a Peace Officer.

"A peace officer is engaged in the performance of his duties if he is lawfully detaining or attempting to detain a person for questioning or investigation. A peace officer is engaged in the performance of his duties if he is using reasonable force to effect a lawful detention.

"A peace officer is not lawfully performing his duties if he is unlawfully detaining someone or using unreasonable or excessive force in his duties.

"A peace officer may legally detain someone if the person consents to the detention or if:

"1. Specific facts known or apparent to the officer lead him to suspect that the person to be detained has been, is, or is about to be involved in activity related to crime;

"AND

"2. A reasonable officer who knew the same facts would have the same suspicion.

"Any other detention is unlawful.

"In deciding whether the detention was lawful, consider evidence of the officer's training and experience and all the circumstances known by the officer when he detained the person.

"Special rules control the use of force.

"A peace officer may use reasonable force to detain someone, to prevent escape, to overcome resistance, or in self-defense.

"If a person knows, or reasonably should know, that a peace officer is detaining him, the person must not use force or any weapon to resist an officer's use of reasonable force.

"However, you may not find the defendant guilty of resisting detention if the detention was unlawful, even if the defendant knew or reasonably should have known that the officer was detaining him.

"If a peace officer uses unreasonable or excessive force while detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself.

"A person being detained uses reasonable force when he: (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection."

Defendant finds fault in the trial court's modification of CALCRIM No. 2670 by adding the second paragraph, which states: "A peace officer is engaged in the performance of his duties if he is lawfully detaining or attempting to detain a person for questioning or investigation. A peace officer is engaged in

the performance of his duties if he is using reasonable force to effect a lawful detention."

Noting that the third paragraph states, "A peace officer is not lawfully performing his duties if he is unlawfully detaining someone or using unreasonable or excessive force in his duties," defendant's appellate counsel believes that the second and third paragraphs are "confusing." This is so, she argues, because the second paragraph uses the phrase, "engaged in the performance of his duties," whereas the third paragraph uses "lawfully performing his duties." However, the purported confusion is concocted because the quotation she parses from the second paragraph leaves out the following words that modify the phrase, "engaged in the performance of his duties," namely, that an officer is "engaged in the performance of his duties *if he is lawfully detaining or attempting to detain a person for questioning or investigation*" and "*if he is using reasonable force to effect a lawful detention*." (Italics added.) She also leaves out parts of the third paragraph, namely, that an officer is "*not* lawfully performing his duties *if he is unlawfully detaining someone or using unreasonable or excessive force in his duties*." (Italics added.)

Reading the second and third paragraphs together, any reasonable juror would understand they mean the same thing--when an officer is lawfully or unlawfully performing his duties during a detention.

Defendant's appellate counsel suggests that, because the "added [second] paragraph also refers to 'lawfully detaining or attempting to detain,'" a jury "might believe that an officer is engaged in the performance of his duties even when he is unlawfully attempting to detain an individual." Reasonable jurors would not interpret the

instructions in such a nonsensical way. (*People v. Napoles* (2002) 104 Cal.App.4th 108, 118 ["we presume that jurors are intelligent people, capable of understanding the instruction and applying it to the facts of [the] case"].)

Defendant's appellate counsel also notes the third paragraph uses the words "unreasonable or excessive force," whereas the second paragraph uses the words "reasonable force" and fails to "include the concept of excessive force." But this one-sentence observation in defendant's opening brief fails to include any analysis or citation to authority to support the implication that reasonable jurors might have been confused rather than reasonably understanding the obvious, i.e., the two paragraphs were simply two ways of saying the same thing. Certainly, any reasonable person would understand that "reasonable force" does not include "excessive force."

III

With respect to the lesser included offense of resisting a peace officer (Pen. Code, § 148, subd. (a)), defendant claims that, in instructing the jury with a modified version of CALCRIM No. 2656, the trial court erred when it denied defendant's request for a pinpoint instruction which, in the words of his appellate counsel, contained "language stating that the prosecution had a duty to prove beyond a reasonable doubt that the force used was not excessive or unreasonable"--language similar to that used in CALJIC No. 16.110.[2]

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[2] CALJIC No. 16.110 states: "In a prosecution for violation of [], the People have the burden of proving beyond a reasonable doubt

In support of this contention, defendant relies on the use note to CALJIC No. 16.110 that cites *People v. White* (1980) 101 Cal.App.3d 161, at page 167, for the proposition that, when there is a claim that an arrest was unlawful because of use of excessive force, the trial court must instruct regarding the prosecution's burden of proof that the force was lawful.

The contention fails because the court did instruct the jurors on the prosecution's burden of proof beyond a reasonable doubt, including proof that Officer Mullen did not use excessive or unreasonable force. The modified version of CALCRIM No. 2656 given by the court said in pertinent part that, to establish that defendant committed the lesser included crimes of resisting a peace officer in the lawful performance of his duties, "the People must prove that: [¶] 1. Michael Mullen was a peace officer lawfully performing or attempting to perform his duties as a peace officer; [¶] 2. The defendant willfully resisted Michael Mullen in the performance or attempted performance of those duties; [¶] AND

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that the peace officer was [engaged in the performance of [his] [her] duties] [or] [discharging or attempting to discharge a duty of [his] [her] office]. [¶] A peace officer is not [engaged in the performance of [his] [her] duties] [or] [discharging or attempting to discharge a duty of [his] [her] office] if [he] [she] [makes or attempts to make an unlawful [arrest] [detention]] [or] [uses unreasonable or excessive force in making or attempting to make the [arrest] [detention]]. [¶] If you have a reasonable doubt that the peace officer was [making or attempting to make a lawful [arrest] [detention]] or [using reasonable force in making or attempting to make the [arrest] [detention]] and thus have a reasonable doubt that the officer was [engaged in the performance of [his] [her] duties] [or] [discharging or attempting to discharge any duty of [his] [her] office], you must find the defendant not guilty [of the crimes[s] of]."

[¶] 3. When the defendant acted, he knew, or reasonably should have known, that Michael Mullen was a peace officer performing or attempting to perform his duties. [¶] . . . [¶] A peace officer is not lawfully performing his duties if he is unlawfully detaining someone or using unreasonable or excessive force in his duties. Instruction 2670 explains when a detention is unlawful and when force is unreasonable or excessive."

By telling the jury that the prosecution had the burden to prove that Officer Mullen was lawfully performing his duties as a peace officer, including that he was not using unreasonable or excessive force, the trial court placed the burden on the People to prove beyond a reasonable doubt that Mullen did not use such unlawful force.

Because the pinpoint instruction requested by defendant would have been duplicative, it was properly denied.

IV

Defendant argues the court erred when it modified CALCRIM No. 2670 to include the following language: "If a person knows, or reasonably should know, that a peace officer is *detaining* him, the person must not use force or any weapon to resist an officer's use of reasonable force. However, you may not find the defendant guilty of resisting *detention* if the *detention* was unlawful, even if the defendant knew or reasonably should have known that the officer was *detaining* him." (Italics added.)

He acknowledges that, at the parties' request, the instruction was modified to substitute the words "detention" and "detaining" for the words "arrest" and "arresting." Yet, he criticizes the second

sentence because "the standard instruction does not give a detention option for the second sentence of the paragraph," and "in [his] case there was no resisting detention charge or resisting detention lesser included offense."

The contention is mystifying. The lesser offense at issue was obstructing or delaying a peace officer in the performance of his duties, which would include resisting a lawful detention. It makes no sense for defendant to claim the trial court erred in telling the jurors that they could "not find [him] guilty of resisting detention [i.e., obstructing or delaying a peace officer in the performance of his duties] if the detention was unlawful, even if the defendant knew or reasonably should have known that the officer was detaining him." The instruction was *beneficial* to defendant, and it was not confusing in any way.

V

Having rejected defendant's claims of instructional error, we reject his argument that the instructions violated his right to due process of law.

VI

Defendant asserts that the prosecutor committed misconduct during closing argument by referring to facts not in evidence and by misstating the law. We find no reversible error.

A

In summation, defense counsel emphasized the prosecutor's burden of proof beyond a reasonable doubt as follows: "This is America. . . . [¶] . . . [¶] And the way it works for us is, on American soil, for anyone who happens to step [*sic*] foot here,

a person is never judged guilty unless it's proven [by the People beyond a reasonable doubt]. . . . [¶] . . . [¶] I think we get that. They haven't proven it. He's not guilty. [¶] . . . [¶] At the end of the day, I really hope that we haven't come to the point where a person can be convicted on battery on an officer with the evidence that we have here in this courtroom."

In rebuttal, the prosecutor argued in pertinent part: "Ladies and gentlemen, the defense attorney just got up here and told you that this is America and he would hope to see the day that this wouldn't happen. To be honest, the fact that the defendant failed to produce his driver's license is the greatest crime that you heard out of all this. It's an offense that not only you can be and should be detained for, you can be arrested and put in custody for. It's actually a violation of the [*sic*] 12500 of the Penal Code. It's a much more significant crime than the driving violations. Point blank, period. End of discussion. The motorist in these conditions will almost on every occasion be taken into detention and usually be arrested."

Defense counsel objected, and the trial court sustained the objection. When defense counsel requested a cautionary instruction, the court said, "No. Mr. [Prosecutor], move on."

The prosecutor went on to argue, "It's a significant crime. It's more significant than the other crime. The fact that this defendant was detained was absolutely and totally within the duty and obligation of this officer, period. [¶] So the fact that defense counsel doesn't like that the defendant was handcuffed and put in the car, that's his right to feel that way, and if he wants

to try and change the laws, he can talk to the [L]egislature, but that is the law. . . ."

Later, the prosecutor argued: "The question defense says, well, the motorist handed the officer the registration and the insurance. I'm not quite sure that's actually accurate. Sounds like the driver had them at one point and they were left in the car. But nonetheless, that's not the crime. The crime is not providing the license. [¶] This sometimes comes up because defense counsel referenced the police report a few times in closing. So I have to let you know. The police report isn't evidence because you haven't received it. It hasn't been marked. It can't come in. So if you wanted to see it, unfortunately, you can't see it. It's not part of the evidence. [¶] The purposes for police report writing is so the officer can record notes to help the officer remember. It's to provide a notice to a defendant to say you've been arrested for this purpose and this is what our investigation is. It's also meant to keep statistics. But that's it."

Defense counsel asked to approach and the following colloquy took place: "THE COURT: Facts not in evidence, Mr. [Prosecutor]. [¶] [THE PROSECUTOR]: That's my point. It's not in evidence. [¶] THE COURT: No. You know what I mean. Don't argue. Facts not in evidence. [¶] [DEFENSE COUNSEL]: Your Honor, there's another point. May we approach? [¶] THE COURT: I'll see counsel at sidebar. Excuse me, ladies and gentlemen."

Following a discussion at the bench that was not recorded by the court reporter, the court sustained the objection.

After the jury retired to deliberate, the following discussion was had between counsel and the court: "[DEFENSE COUNSEL]: I have a motion. [¶] THE COURT: Yes. You can make the motion. [¶] I also want you both to be able to put on the record anything you might want from the couple of quick sidebars that we had. [¶] Go ahead, Mr. [Defense Counsel]. [¶] [DEFENSE COUNSEL]: I'm not saying this is misconduct. For all the prosecutors I know, he's least likely to commit misconduct. What I am saying is this, sometimes in the heat of battle things happen, and this is one of the things. To suggest to the jury that the vast majority or majority or three out of four, I don't remember exactly how that was put, but people without a license are taken into custody, not only when there's no evidence in the record that says that, but it goes to the heart of the whole defense strategy was to show that it was unreasonable from the outset to cuff this person and put him in a patrol car without even inquiring in least [*sic*] aggressive ways. [¶] What they're told now is, well, this guy was going to go any way, so this attorney is full of crap. That's exactly what I'd be thinking if I was a juror. And I think it was extremely prejudicial, and to not get the cautionary instruction that I asked for just leaves it exactly the way it was. I'm moving for a new trial. [¶] THE COURT: Well, I sustained the objection. I understand that about half of the phrase actually came out. I do think, particularly in rebuttal argument, that some rebuttal is appropriate. He certainly has the right to rebut the suggestion that what this officer did was unheard of because, frankly, it's not. And you know that and I know that and [the prosecutor] knows that. [¶] On the other hand, he can't argue facts

not in evidence. And by sustaining the objection the first time you objected, at the first point you objected, I think that I felt -- I felt that I struck the appropriate balance for this jury. [¶] The jury has previously been instructed, as a matter of fact, twice, that counsel's arguments are not evidence and that the only evidence that they are to consider comes from the witnesses on the witness stand. And so I feel that that was all that was necessary to cure this particular issue. [¶] Frankly, I felt that if I drew any more attention to it, it might actually do more harm than good. It was a very quick comment. The objection was quickly sustained, and I didn't feel like there was a need to go any farther than that. So I am going to deny the motion."

B

Defendant argues "the prosecutor misstated the law by telling the jury that [defendant] not having his driver's license in his possession when stopped by [Police Officer] Mullen was a violation of [Vehicle] Code section 12500, and that it is 'a much more significant crime than the driving violations.'"[3] (Further section references are to the Vehicle Code.)

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[3] As defendant points out, the prosecutor referred to Penal Code section 12500, which was an obvious mistake because that statute defines a "silencer" used to muffle, diminish, or silence the sound of a firearm." It is subdivision (a) of Vehicle Code section 12500 that makes it unlawful to "drive a motor vehicle upon a highway, unless the person then holds a valid driver's license issued under this code, except those persons who are expressly exempted under this code." The misstatement was immaterial because the jury was not provided with any information about the nature of a Penal Code section 12500 violation, and it was obvious that the prosecutor was

He acknowledges a violation of section 12500 is a misdemeanor (§ 40000.11, subd. (b)), and thus it is more significant than the infractions of violating section 12951, subdivision (a) (failing to have a valid driver's license in one's immediate possession while driving a motor vehicle) and running a stop sign, speeding, and failing to stop at the limit line, which also are infractions. But, he notes, a violation of section 12500 is not more serious than a violation of section 12951, subdivision (b) (not presenting a driver's license for inspection upon the demand of a peace officer enforcing provisions of the Penal Code), which like section 12500, is a misdemeanor. (§ 40000.11, subd. (i).)

The real point, however, of defendant's claim of error is his suggestion that the prosecutor did not present any evidence that defendant lacked a valid driver's license and thus violated section 12500, a misdemeanor, rather than section 12951, subdivision (a), an infraction. Thus, defendant asserts, the prosecutor committed misconduct by making an argument (defendant violated section 12500) unsupported by evidence, and then compounding the misconduct by also telling jurors that motorists who violate section 12500 "will almost on every occasion be taken into detention and usually be arrested" (an argument that was not supported by any evidence introduced at trial).[4]

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referring to a violation of Vehicle Code section 12500, driving a car without holding a valid driver's license.

[4] We decline to address the People's contention that defendant's claim of prosecutorial misconduct is forfeited by his failure in the trial court to specifically base his objection on the ground of prosecutorial misconduct; indeed, in objecting, defense counsel

This argument, defendant claims, may have led the jurors to conclude, "without examining any other evidence, that [he] had been lawfully detained, which undermined the defense position that [Officer] Mullen was not lawfully performing his duties when he placed [defendant] in handcuffs and took him back to the patrol car."

However, the trial court sustained defense counsel's objection to the aforesaid argument, although it denied counsel's request for a cautionary instruction. The court later noted it had twice instructed the jurors that argument by counsel is not evidence and that the verdict must be based only on evidence presented in the courtroom in the form of exhibits and the sworn testimony of witnesses, and further told the jurors that *they should not assume something is true just because one of the attorneys suggested it is true*. The trial court also carefully instructed the jurors on the elements of the alleged crimes and lesser included offenses and on the test they must apply in determining whether the officer was lawfully performing his duties when he detained defendant.

We are thus satisfied the argument of which defendant complains did not prejudice him; indeed, the jury found defendant not guilty of both battery on a peace officer and the lesser included offense of simple battery. It convicted him only of resisting a peace officer in the lawful performance of his duties, a verdict that is supported by overwhelming evidence.

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said: "I'm not saying this is misconduct. For all the prosecutors I know, he's the least likely to commit misconduct."

Defendant also complains the prosecutor told the jury that the purpose of a police report is for officers to record their notes to help them remember, to provide notice to defendants as to why they were arrested, and to keep statistics. Defendant argues the "only facts in evidence regarding the purpose of [a] police report was [Officer] Mullen's testimony that one of the primary reasons for a report is to refresh the officer's recollection in the event testimony is needed in the future."

The problem, according to defendant, is the following.

During cross-examination of the officer, defense counsel "attempted to discredit Mullen's testimony that he had fallen into the police car on top of [defendant], by having the officer refer to his report and acknowledge that he had not put that information in his report." Specifically, defense counsel stated: "[Officer Mullen] explains [the purpose of a police report] and he knows because he's a teacher of POST courses. He testifies in hearings and trials. And he told you that when he prepared his report he knows he's going to have to possibly justify his conduct. And he also knows that his report becomes the basis for his testimony or at least the basis for him to testify, sometimes months and years later when he no longer remembers details. [¶] So when he prepared this report, you better believe that if he's got to justify what happened, it's going to be in there. . . ." Defense counsel then went on to assert there were discrepancies between Mullen's testimony and the contents of his police report.

In rebuttal, the prosecutor correctly pointed out that Officer Mullen's report was not in evidence. However, the trial court

sustained defense counsel's objection when the prosecutor went on to say that, in addition to being used to refresh an officer's recollection, a police report serves the functions of providing "notice to a defendant to say you've been arrested . . . and this is what our investigation is" and it is "also meant to keep statistics."

Even though the objection was sustained and the prosecutor said nothing else on the point, defendant believes that the prosecutor's rebuttal argument about the purposes of a police report "essentially told the jury that defense counsel's cross-examination of Mullen on that point had been improper, because of his use of the police report." Stated another way, defendant argues that "in telling he [*sic*] jury the limited purposes of a police report, and that it was not evidence, [the prosecutor] was telling the jury to discredit the defense argument that certain portions of Mullen's testimony were questionable because they were not included in the police report."

No reasonable juror would so interpret the prosecutor's comment on the purpose of a police report. And we can confidently say that the jurors in this case did not do so because they found defendant not guilty of battery on a police officer and simple battery, a result defense counsel was seeking by emphasizing that Officer Mullen did not put in his police report certain facts about the scuffle that he said at trial had occurred when he was trying to put defendant into the police car.

Simply stated, the prosecutor's argument about the police report did not constitute a deceptive or reprehensible method of attempting to persuade the jury, and it is not reasonably probable that, without the argument, defendant would have obtained a more favorable outcome.

(*People v. Rundle* (2008) 43 Cal.4th 76, 157, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, Acting P. J.*

We concur:

BUTZ, J.

CANTIL-SAKAUYE, J.

* Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.